

IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU  
(Civil Jurisdiction)

Civil  
Case No. 20/1891 CIVIL

**BETWEEN:**     **David Anthony Phillips**  
Applicant

**AND:**           **Ilo Nalau Hannaline**  
First Respondent  
**The Public Prosecutor**  
Second Respondent

*Date:*                     29 September 2020  
*Before:*                 Justice G.A. Andrée Wiltens  
*Counsel:*               Ms M. Mala for Mr S. Kalsakau for the Claimant  
                              Mr S. Aron for the Respondents

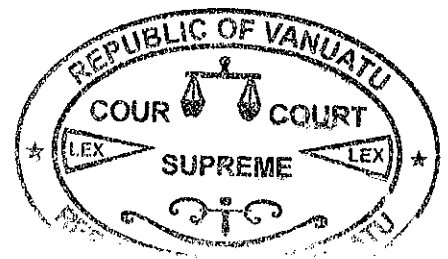
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**Judgment**

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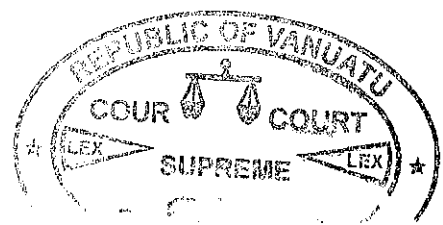
A. Introduction

1. This case involves an application for judicial review.
2. What is challenged is the 15 July 2020 decision of a Magistrate as to sufficiency of evidence and the committal of Mr Phillips to the Supreme Court for trial on criminal allegations following a preliminary inquiry.
3. The decision of the Public Prosecutor in commencing a criminal prosecution is also challenged.
4. As required by the Civil Procedure Rules, this matter was scheduled for a Rule 17.8 hearing.
5. This decision deals with that aspect of the matter.



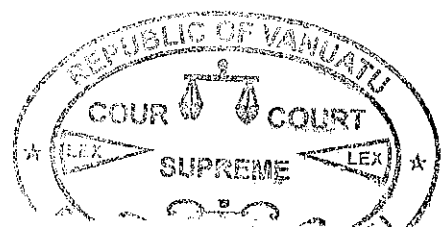
B. The Application

6. Mr Kalsakau filed the application in Luganville, just prior to a succession of Public Holidays relating to the 40<sup>th</sup> Anniversary of the Independence of the Republic of Vanuatu, which somewhat delayed matters. The relief sought was:
  - An order quashing the 15 July 2020 decision by the Magistrate of a *prima facie* case having been established;
  - An order quashing the 15 July 2020 decision by the magistrate to commit Mr Phillips to the Supreme Court for trial;
  - An order quashing the 14 July 2020 Information against Mr Phillips as being contrary to natural justice;
  - An order quashing the Public Prosecutor's decision to prosecute Mr Phillips due to insufficient evidence being available;
  - A declaratory order that the decision to prosecute was unreasonable; and
  - A permanent stay of the prosecution due to unfairness.
7. In his submissions seeking to persuade the Court of the Rule 17.8 matters, Mr Kalsakau has narrowed down the focus of his case. What is to now be considered are the decision of the Public Prosecutor to lay charges and the decisions of the Magistrate in holding that a *prima facie* case had been made out and committing Mr Phillips to the Supreme Court to stand trial. Mr Kalsakau does however seek all his remedies as outlined above.
8. The 6-weeks delay in dealing with the Rule 17.8 conference lies at the feet of the State Law Office. Mr Kalsakau filed his submissions in relation to this aspect on 6 August 2020. Mr Aron was directed to respond by 25 August 2020. He was then directed to file by 1 September 2020, by 9 September 2020 and 19 September 2020. The final direction made it clear that if not filed by 19 September 2020, then no submissions would be accepted.
9. Mr Aron caused a synopsis of his submissions in response and the Respondent's Defence to the Judicial Review application to be filed with the Supreme Court at 4.30pm on 28 September 2020 – just in time for the scheduled hearing today, but well outside the time permitted by the Court's direction of 11 September 2020.
10. Given the earlier opportunities which have not been complied with, Mr Aron's submissions are not accepted. I put them to one side and decline to allow him to make oral submissions on the Rule 17.8 matters. That is a direct consequence for his completely unacceptable non-compliance with several Court directions.
11. Apparently today, at sometime around 12 noon, a sworn statement by Mr D. Boe has been filed in Luganville which relates to this matter. I have not seen the statement, but in any event due to the lateness of filing, I do not need or want to see it. Neither have I any intention of considering the contents of the Defence filed.



C. Discussion

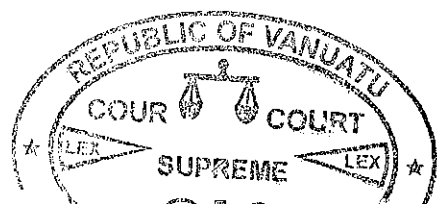
12. Mr Kalsakau correctly submitted that under Rule 17.8 the Court requires to be satisfied as to 4 matters in order for the case to proceed to trial. If any one of the 4 aspects is not established, the Court must strike out the proceeding.
13. The four aspects of which the Court must be satisfied are that :
  - (i) the Claimant has an arguable case;
  - (ii) the Claimant is directly affected by the decision under the challenge;
  - (iii) there has been no undue delay in making the Claim; and
  - (iv) there is no other available remedy which resolves the matter fully and directly.
14. It is apparent that there has been no undue delay and that Mr Phillips is personally affected by the decisions under challenge.
15. However, the other two aspects are more problematic.
16. Firstly, Mr Kalsakau maintains that the Information lacks sufficient particularisation. The charges clearly set out allegations of sexual intercourse without consent, but Mr Kalsakau is concerned at the wide definition involved and seeks clarification as to the type of penetration alleged. Mr Kalsakau has now sought further particulars from the prosecutor and is awaiting a response.
17. Mr Kalsakau also seeks clarification as to date and times. It is true that the complainant does not stipulate a date or time for her allegations, but the nature of the complaint is Mr Phillips forced himself upon the complainant in order to have sexual intercourse with her on a continual basis over a long period, sometimes more than once in the day. It is not surprising that the prosecution has laid representative charges. The complainant's position is that she did not truly consent to any such sexual intercourse.
18. Accordingly, at first blush, there might appear to be a lack of particularisation. However, I am confident that can be resolved prior to trial. It is no impediment to a fair trial taking place.
19. Further, if Mr Phillips considers he is unable to adequately respond to the allegations as they are currently set out in the Information, there is an avenue open to him to make application to the Supreme Court for further and better particulars. Accordingly, in my view, Judicial Review is not the appropriate challenge in relation to this aspect – something Mr Kalsakau conceded in argument.
20. Secondly, Mr Kalsakau submitted that the decision to prosecute was based on "flimsy and mostly circumstantial and hearsay evidence". He considered the decision was contrary to the Prosecutor's code as it failed to take into account relevant matters or it was "a poor assessment" of the available evidence. He concluded that no reasonable person would have determined that to prosecute was "the right call".



21. This submission ignores a fundamental consideration, namely the independence of the Public Prosecutor. Only in the most rare of instances should a Court look to intervene and upset a decision to prosecute by the very independent institution created under the Constitution to make those decisions.
22. The evidence that would be required to support such intervention would need to extremely strong and clearly point to corrupt practice, the acceptance or offer of bribery, or some other form of dishonesty on the part of the Public Prosecutor. There is nothing of that sort involved in this case. The reality is that Mr Kalsakau disagrees with the Public Prosecutor's decision, but that would not be unusual in the case of many prosecutions. The fact that he disagrees with the decision is an insufficient basis to found an application for Judicial Review.
23. The complainant's sworn statement very clearly makes criminal allegations; and the matters that the Public Prosecutor took into consideration in making the decision to proceed to prosecute are unknown to anyone but the Public Prosecutor. Mr Kalsakau submitted that relevant matters were not taken into account, but he cannot know that with any certainty.
24. Thirdly, Mr Kalsakau submitted that the Magistrate's decision to commit Mr Phillips to the Supreme Court for trial was wrong in law, due to the lack of particulars in the Information. As already mentioned, I do not support the challenge as to lack of particulars. The Magistrate's task was to ensure that there was evidence available which, if believed, could support a conviction. There is such evidence available in the form of the allegations by the complainant.
25. That is not to say that a conviction will result – that will depend on the Court's assessment of the veracity and reliability of the prosecution case, after any evidence led by the defence has been taken into consideration.
26. Mr Kalsakau sought to persuade me that there was an arguable case here for Judicial review. I do not see it.
27. This is really yet another example of civil procedure and civil remedies being sought in the criminal arena. While there is limited jurisdiction for this juxtaposition, the reality is that Mr Phillips will have to defend the charges in the criminal jurisdiction of the Supreme Court. There are ample safeguards in place within the Penal Code and Criminal Procedure Code to be sure Mr Phillips will be able to have a fair trial.
28. It would be completely wrong to declare this prosecution as unreasonable at this point in time. It would be wholly wrong also to permanently stay this prosecution. There is public interest on matters such as this being heard in the Courts and an assessment of the merits of the case made, rather than the case being dismissed or stay for what might be considered technical reasons.

D. Result

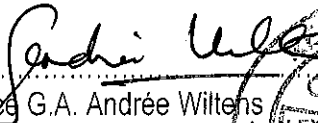
29. The application for Judicial Review is struck out in its entirety, pursuant to Rule 17.8 of the Civil Procedure Rules. All the relief sought is declined. This criminal matter is now being case-managed by Justice Trief – the next appearance is a conference tomorrow.



30. Costs would ordinarily follow the event, but in this instance the State Law Office has been so remiss in complying with Court directions, there will be no order as to costs.

Dated at Port Vila this 29th day of September 2020

BY THE COURT

  
.....  
Justice G.A. Andrée Wiltens

